No. 14-185

In the Supreme Court of the United States

NOEL REYES MATA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT SUPPORTING REVERSAL AND REMAND

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QUESTION PRESENTED

Whether the court of appeals has jurisdiction to review the Board of Immigration Appeals' decision denying petitioner's request for equitable tolling of the 90-day deadline for filing petitioner's motion to reopen removal proceedings on account of alleged ineffective assistance of counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted in 558 Fed. Appx. 366. The decisions of the Board of Immigration Appeals (Pet. App. 4-5, 6-9; J.A. 4-5) and Immigration Judge (J.A. 6-13) are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2014. A petition for rehearing was denied on May 16, 2014 (Pet. App. 24-25). The petition for a writ of certiorari was filed on August 14, 2014, and

[1] The initial, unsigned transcription of the Immigration Judge's oral decision (Pet. App. 10-23) does not contain the Judge's corrections to that transcription in her signed decision (J.A. 6-13).

was granted on January 16, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

Petitioner is a native and citizen of Mexico who unlawfully entered the United Sates without being admitted or paroled. Pet. App. 1; Administrative Record (A.R.) 562. The Immigration Judge (IJ) ordered petitioner removed from the United States, J.A. 6-13, and the Board of Immigration Appeals (Board) summarily dismissed his appeal because petitioner failed to file an appellate brief or any other explanation of the basis for his appeal, J.A. 4-5.

After the deadline for filing a motion to reopen the removal proceedings had passed, petitioner filed such a motion with the Board. Pet. App. 6. "A motion to reopen is a form of procedural relief that 'asks the Board to change its decision in light of newly discovered evidence or a change in circumstances.'" *Dada* v. *Mukasey*, 554 U.S. 1, 12 (2008). Petitioner argued in his motion (A.R. 88-96) that his prior counsel was ineffective and that counsel's ineffective assistance was an exceptional circumstance warranting reopening. A.R. 95. The Board held that "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel," but it denied the motion because petitioner failed to show his eligibility for relief from removal. Pet. App. 7-9.

The court of appeals held that it lacked jurisdiction to review the Board's decision denying petitioner's

motion to reopen. Pet. App. 1-3. The court stated that it would "construe[]" petitioner's "request for equitable tolling on the basis of ineffective assistance of counsel" as a request that the Board exercise its discretion to reopen proceedings "*sua sponte*," and that it lacked jurisdiction to review the latter, "complete[ly] discretion[ary]" Board decision. *Id.* at 2-3. The government agrees with petitioner that the court of appeals erred, because the court did have jurisdiction to review the Board's denial of petitioner's untimely motion to reopen.

1. a. i. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, "guarantees to each alien the right to file 'one motion to reopen [removal] proceedings'" under 8 U.S.C. 1229a. *Dada*, 554 U.S. at 15 (quoting 8 U.S.C. 1229a(c)(7)(A)). That motion must be filed with the Board or IJ, whichever was last to render a decision in the case. 8 C.F.R. 1003.2(a) and (c) (Board); 8 C.F.R. 1003.23(b)(1) and (3) (IJ). The motion must be "supported by affidavits or other evidentiary materials" showing "new facts," 8 U.S.C. 1229a(c)(7)(B), that are "'material' and of the sort that 'could not have been discovered or presented at the former hearing.'" *Dada*, 554 U.S. at 14 (quoting 8 C.F.R. 1003.2(c)(1)); see 8 C.F.R. 1003.23(b)(3) (IJ).

The INA provides that an alien's "motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal," subject to certain exceptions. 8 U.S.C. 1229a(c)(7)(C)(i); see 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). Specifically, that deadline is lengthened or eliminated for several types of reopening motions not relevant here, *i.e.*, certain motions seeking asylum or withholding of removal based on "changed country conditions"; requesting

rescission of a removal order entered in absentia under 8 U.S.C. 1229a(b)(5); and seeking relief under special provisions for certain battered spouses, children, and parents. 8 U.S.C. 1229a(c)(7)(C)(ii)-(iv); see 8 C.F.R. 1003.2(c)(3), (ii) and (iii), 1003.23(b)(4)(i) and (ii). In addition, if the alien and the Department of Homeland Security (DHS) agree on reopening and "jointly file[]" a motion to reopen, the joint motion may be filed at any time. 8 C.F.R. 1003.2(c)(3)(iii), 1003.23(b)(4)(iv).[2]

"The decision to grant or deny a motion to reopen" lies "within the discretion of the Board." 8 C.F.R. 1003.2(a); see 8 C.F.R. 1003.23(b)(1)(iv) (IJ). The Board may deny a motion to reopen on any of "at least three independent grounds." *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). First, the Board may conclude that the alien failed to establish a "prima facie case" of eligibility for the underlying relief sought by failing to show a "reasonable likelihood of success on the merits" if proceedings were reopened. *In re L-O-G-*, 21 I. & N. Dec. 413, 419-420 (B.I.A. 1996); see *Abudu*, 485 U.S. at 104. Second, "[t]he Board has discretion to deny a motion to reopen even if the [movant] has made out a

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[2] The timing requirements for motions to reopen removal proceedings are different from those for motions to reopen deportation or exclusion proceedings commenced prior to 1996. In 1996, Congress abolished the distinction between deportation and exclusion procedures by establishing "removal" proceedings as the uniform agency process to adjudicate cases of deportable and inadmissible aliens. 8 U.S.C. 1229a(a)(1), (3) and (e)(2); see *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1484-1485 (2012). The timing of motions to reopen legacy cases in deportation or exclusion proceedings remain governed by distinct provisions not relevant here. See 8 U.S.C. 1252b(c)(3) (1994) (repealed 1996); 8 C.F.R. 1003.2(c)(2), (3)(i) and (iv), 1003.23(b)(1) and (4)(iii).

prima facie case." 8 C.F.R. 1003.2(a); see 8 C.F.R. 1003.23(b)(3) (IJ). The Board may thus deny reopening if it finds that the alien failed to proffer "previously unavailable, material evidence" or otherwise to explain adequately his failure to seek relief earlier. *Abudu*, 485 U.S. at 104-105; see 8 C.F.R. 1003.2(c)(1) (motion "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing"); 8 C.F.R. 1003.23(b)(3) (IJ). Third, where the ultimate grant of relief is discretionary (*e.g.*, cancellation of removal), the Board may conclude that, regardless of the proper resolution of the "two threshold concerns" just discussed, the alien should not be afforded the "discretionary grant" of relief. *Abudu*, 485 U.S. at 105.

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases," *Abudu*, 485 U.S. at 107, and because, as a general matter, "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States," *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). Accordingly, an alien moving the Board for reopening must "meet[] a 'heavy burden' and present[] evidence of such a nature that the Board is satisfied that if proceedings * * * were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992); see *Abudu*, 485 U.S. at 110.

ii. The authority of the Board to reopen removal proceedings is not limited to its adjudication of a motion filed by an alien. The Board "may at any time reopen" the proceedings "on its own motion" in any case in which it has rendered a decision. 8 C.F.R. 1003.2(a); see 8 C.F.R. 1003.23(b)(1) (IJ). Accordingly, if an alien fails to file a timely motion to reopen, he may suggest that the Board exercise that authority to reopen his case *sua sponte*. The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

b. The INA provides that, with exceptions not relevant here, "[j]udicial review of a final order of removal * * * is governed only by [the Administrative Orders Review Act of 1950 (Hobbs Act), 28 U.S.C. 2341 *et seq.*]," and that such Hobbs Act review in a court of appeals is "the sole and exclusive means for judicial review of an order of removal." See 8 U.S.C. 1252(a)(1), (5) and (b)(9); *Stone* v. *INS*, 514 U.S. 386, 392 (1995). That jurisdiction extends to judicial review of an order denying an alien's motion to reopen. *Id.* at 394. If the alien also petitions for review of the underlying order of removal, the INA requires that "any review sought of a motion to reopen * * * shall be consolidated with the review of the order." 8 U.S.C. 1252(b)(6).

2. a. Petitioner unlawfully entered the United States on an unknown date. A.R. 562. In August 2010, he was charged with assault on a family member under Texas Penal Code Ann. § 22.01(a)(1) (West

2011), for striking and grabbing a woman with whom he was then having a "dating relationship." Pet. App. 12; A.R. 523 (criminal information), 526-527 (judgment of conviction).[3] In September 2010, petitioner pleaded guilty to the assault charge. A.R. 526-527. The trial court expressly found, under Article 42.013 of the Texas Code of Criminal Procedure, that petitioner's offense involved "family violence." A.R. 526; see Pet. App. 12-13.

b. The day after his conviction, DHS initiated removal proceedings against petitioner. Pet. App. 11; A.R. 562-563. Petitioner conceded that he was removable as charged, J.A. 196 (hearing transcript), but filed an application for cancellation of removal (A.R. 212-519). Pet. App. 11; A.R. 196-197.

Cancellation of removal is a form of discretionary relief available for certain aliens. 8 U.S.C. 1229b. In general, a non-permanent-resident alien like petitioner must establish four statutory prerequisites to be eligible for such relief. 8 U.S.C. 1229b(b)(1)(A)-(D). Two of those prerequisites are that (a) the alien has not been convicted of an offense described in 8 U.S.C. 1182(a)(2), 1227(a)(2) or (3); and (b) "removal would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child" who is a United States citizen or lawful permanent resident. 8 U.S.C. 1229b(b)(1)(C)-(D).

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[3] The district attorney's records state that petitioner was married to the victim, who informed the police that petitioner had "struck her on multiple occasions," and that petitioner had been charged because he had "kicked [her]," "threw her to the ground," and then "grabbed [her] by the hair and began to drag her through the house." A.R. 541; see A.R. 523 (charging petitioner for kicking and grabbing the victim); cf. J.A. 18.

In August 2011, the IJ denied petitioner's application and ordered him removed to Mexico. Pet. App. 21-23 (order); J.A. 6-13 (opinion). The IJ concluded that petitioner's assault offense, which was "morally reprehensible and necessarily involve[d] turpitudinous conduct," was a "crime involving moral turpitude" under 8 U.S.C. 1227(a)(2)(A)(i) that rendered petitioner ineligible for cancellation of removal. J.A. 11-12.

c. In September 2011, petitioner, through counsel, timely noticed an administrative appeal. A.R. 173-175. The form notice included a prominent warning instructing petitioner to "clearly explain the specific facts and law on which you base your appeal," because "[t]he Board may summarily dismiss your appeal" if it cannot determine its basis. A.R. 174. Counsel did not identify the appeal's factual or legal basis, but he checked a box indicating that a separate, written brief would be filed. *Ibid.* The October 2011 briefing notice informed petitioner that his brief would be due on November 10, 2011, and warned that "[i]f you fail to file the brief" by that date, "the Board may summarily dismiss your appeal." A.R. 168. On October 26, 2011, petitioner's counsel mailed a motion to extend petitioner's briefing deadline by 21 days. A.R. 165-166. On November 1, 2011, the motion was denied. A.R. 160. The denial stated that, if petitioner were to file a brief after the November 10 deadline, the brief must be accompanied with "a motion for consideration of [the] late-filed brief * * * set[ting] forth in detail the reasons that prevented you from filing your brief on time." *Ibid.* Petitioner failed to file a brief. J.A. 5.

On September 21, 2012, more than ten months after petitioner's briefing deadline had passed, the Board summarily dismissed petitioner's appeal. J.A.

4-5; see 8 C.F.R. 1003.1(d)(2)(i)(A) and (E). The Board explained that petitioner's notice of appeal did not identify the basis for his appeal and that petitioner failed to file a brief despite being warned that such a failure could result in summary dismissal. J.A. 4-5. The Board's decision was promptly served on petitioner by mail. A.R. 118 ¶ 21, 138-139. Petitioner did not seek judicial review.

3. a. By October 15, 2012, petitioner had already consulted with new attorneys about his case, at least two of whom told him that his prior counsel had performed ineffectively by failing to file an appellate brief. A.R. 118 ¶ 25, 119. At that point, petitioner still had more than two months before the 90-day period to file a motion to reopen would expire (on December 20, 2012). See 8 U.S.C. 1229a(c)(7)(C)(i); 8 C.F.R. 1003.2(c)(2). Petitioner failed to file a motion to reopen by that deadline.

On January 14, 2013, petitioner filed a motion with the Board to reopen his case. Pet. App. 6; see A.R. 88-95 (motion); A.R. 96-135 (motion's exhibits). Petitioner argued that he met the requirements in *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988), for establishing a claim of ineffective assistance of counsel as a basis for reopening. A.R. 92-95. *Lozada* established three procedural requirements for motions to reopen based on ineffective assistance of counsel. Such a motion must include an affidavit from the alien detailing the relevant facts; show that the alien informed his prior counsel of the allegations and attach any response to the motion; and show that a complaint has been submitted to "appropriate disciplinary authorities" for any violation of counsel's "ethical or legal responsibilities" or explain why one was not submit-

ted. *Lozada*, 19 I. & N. Dec. at 639. In addition, the motion must demonstrate that the alien was "prejudice[d]" by counsel's allegedly deficient actions or inactions. *Id.* at 638, 640; see *In re Assaad*, 23 I. & N. Dec. 553, 556 (B.I.A. 2003). Petitioner's motion, however, did not show why his counsel's actions prejudiced him in his ability to seek cancellation of removal, because the motion neither addressed why petitioner's conviction was not a crime involving moral turpitude nor proffered a proposed brief explaining how the IJ had erred. Pet. App. 8.

b. The Board denied reopening. Pet. App. 6-9. The Board noted that, although petitioner's motion was not filed timely, "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel." *Id.* at 6-7. The Board rejected petitioner's tolling request, however, because petitioner failed to establish that he was prejudiced by the asserted ineffectiveness. *Id.* at 7-9.

That was so, the Board explained, because petitioner failed to show, for two independent reasons, that he "is eligible for the [cancellation-of-removal] relief [he] sought." Pet. App. 7. First, the Board reasoned that petitioner's assault offense was a crime involving moral turpitude rendering him ineligible for cancellation relief. *Id.* at 7-8. Petitioner's motion to reopen, the Board observed, failed to include "a proposed appellate brief or other argument to persuade" the Board that the IJ's ruling on that issue was "incorrect or would have been overturned on appeal if a brief had been filed" by counsel. *Id.* at 8. Second, the Board concluded that the hardships to petitioner's children identified in his motion did not warrant reopening because they were not the type of "'exceptional

and extremely unusual' hardships" required for petitioner to be eligible for cancellation of removal. *Id.* at 8-9 (quoting 8 U.S.C. 1229b(b)(1)(D)).

The Board separately declined to exercise its authority to reopen the removal proceedings on its "own motion." Pet. App. 9 (quoting *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997)). The Board noted that its authority to reopen proceedings *sua sponte* "'is not meant to be used as a general cure for filing defects.'" *Ibid.* (quoting *In re J-J-*, 21 I. & N. Dec. at 984).[4]

4. The court of appeals, as relevant here, dismissed petitioner's petition for review of the Board's decision denying his motion to reopen. Pet. App. 1-3. Petitioner acknowledged to the court that his motion to reopen was filed after the 90-day deadline had passed, but he contended that the Board should have equitably tolled the filing deadline because counsel's failure to file a brief in petitioner's original appeal to the Board constituted ineffective assistance. *Id.* at 2. In response, the government argued, *inter alia*, that the court of appeals lacked jurisdiction to consider the Board's denial of petitioner's request for equitable tolling under the court's prior decision in *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008)). Gov't C.A. Br. 18-19.

The court of appeals concluded that it lacked jurisdiction to review the Board's reopening decision. Pet. App. 2-3. The court explained that, under circuit

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[4] The Board denied petitioner's subsequent motion to reconsider its reopening denial. Pet. App. 4-5. Petitioner filed a separate petition for review to challenge that decision, but the court of appeals denied that petition because petitioner "abandoned [his] challenge" by failing to brief it adequately. *Id.* at 3. That aspect of the court of appeals' decision is not before this Court.

precedent, "an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the [Board] to exercise its discretion to reopen the removal proceeding *sua sponte*." *Id.* at 2 (citing *Ramos-Bonilla*, 543 F.3d at 220). The court reasoned that because the Board has "complete discretion" in determining whether to reopen *sua sponte*, the court has "no meaningful standard against which to judge [the Board's] exercise of [that] discretion." *Id.* at 2-3. The court therefore held that it "lack[ed] jurisdiction to review such decisions." *Id.* at 3.

SUMMARY OF ARGUMENT

The question presented in this case is narrow: Whether the court of appeals had jurisdiction to conduct judicial review of the Board's denial of petitioner's request to equitably toll the 90-day filing deadline for his motion to reopen based on his assertion of ineffective assistance of counsel. That jurisdictional issue does not turn on the proper resolution of the merits of the yet-to-be-performed review. It therefore does not require this Court to decide whether the Board in fact erred in its disposition or whether equitable tolling is appropriate in motion-to-reopen contexts more generally. The question presented merely asks whether the court of appeals had authority to decide such issues. The government agrees with petitioner that the court of appeals possessed jurisdiction to review the Board's reopening decision. This case should be remanded to the court of appeals to conduct such review in the first instance.

1. This Court has repeatedly concluded that the courts of appeals have jurisdiction to review the Board's denial of a motion to reopen, albeit under a

highly deferential abuse-of-discretion standard. That jurisdiction to review the Board's denial of a motion to reopen flows directly from the INA's express grant of Hobbs Act jurisdiction to the courts of appeals to review final orders of removal. 8 U.S.C. 1252(a)(1); 28 U.S.C. 2342. Indeed, Congress has expressly directed that judicial review of "a motion to reopen" be consolidated with review of the underlying order of removal. 8 U.S.C. 1252(b)(6).

Judicial review of the Board's denial of a motion to reopen as untimely based on the Board's conclusion that equitable tolling of the alien's deadline is unwarranted is not materially different from judicial review of the Board's denial of motions to reopen more generally. Each component of the Board's tolling decisions—whether the alien was diligent in pursing his rights, whether the alien satisfied the *Lozada* requirements for establishing ineffective assistance, and whether the alien showed that he was prejudiced thereby with a sufficient showing that he is eligible for the underlying form of relief that he would seek in reopened removal proceedings—is properly and regularly reviewed by the courts of appeals for an abuse of discretion.

2. The court of appeals concluded that, under its precedent, it was bound to "construe[]" petitioner's motion to reopen seeking "equitable tolling on the basis of ineffective assistance of counsel" as "an invitation for the [Board] to exercise its discretion to reopen the removal proceedings *sua sponte*." Pet. App. 2. That approach was erroneous for multiple reasons. First, the Board did not base its decision on that ground, and it is well settled that judicial review of agency action is confined to "the grounds upon

which the [*agency*] *itself* based its action." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (emphasis added). Second, the Board's authority to equitably toll the 90-day filing deadline for an *alien's motion* to reopen is logically and doctrinally distinct from the Board's independent authority to reopen removal proceedings "at any time" "on its *own motion*," 8 C.F.R. 1003.2(a) (emphasis added). The very concept of tolling a deadline makes no sense when the Board exercises its *sua sponte* reopening authority because no deadline governs that independent power. Indeed, as in this case, the Board analyzes equitable tolling for ineffective-assistance separately from its *sua sponte* authority.

Whether the Board's conclusion that equitable tolling is available in appropriate circumstances in this context, and whether the Board abused its discretion in denying reopening in this case, are merits questions that are not before this Court and should not be addressed at this time. The question presented is limited to whether the court of appeals had jurisdiction to conduct judicial review, and the court of appeals has yet to resolve on the merits whether the Board erred in its tolling analysis in this case. Moreover, the court of appeals has not resolved in a precedential decision whether the 90-day deadline for an alien's motion to reopen may be equitably tolled. Although the government's position is that the Board correctly exercised its discretion in concluding that the deadline may be equitably tolled in appropriate cases, the court of appeals can resolve that merits question in the first instance on remand.

ARGUMENT

THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE BOARD'S DENIAL OF PETITIONER'S REQUEST TO EQUITABLY TOLL THE 90-DAY FILING DEADLINE FOR HIS MOTION TO REOPEN BASED ON ASSERTED INEFFECTIVE ASSISTANCE OF COUNSEL

The court of appeals erred in holding that it lacked jurisdiction to review the Board's denial of petitioner's motion to reopen proceedings before the Board. The Board held that "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel," but it concluded that tolling was unwarranted in this case because petitioner failed to establish a necessary element of his ineffectiveness claim: prejudice. Pet. App. 6-7. The Board explained that petitioner had not shown that deficient conduct by his counsel prejudiced him because his reopening motion failed to demonstrate a *prima facie* case that petitioner was eligible for cancellation of removal. *Id.* at 7-9. That was so, the Board reasoned, both because petitioner's conviction disqualified him for that relief and because petitioner's motion had not demonstrated that his removal would result in "exceptional and extremely unusual" hardship to his children. *Ibid.* (quoting 8 U.S.C. 1229b(b)(1)(D)). The Board's denial of a request for equitable tolling, and the resulting denial of an alien's motion to reopen as untimely, are subject to review in the same manner as other decisions denying motions to reopen. Accordingly, the court of appeals here had jurisdiction to review the Board's ruling denying equitable tolling in the same way that courts of appeals have long conducted judicial review of the Board's denial of motions to reopen proceedings.

A. The Court Of Appeals Had Jurisdiction To Review The Board's Denial Of Petitioner's Motion To Reopen

The INA vests the courts of appeals with jurisdiction to review the Board's denial of a motion to reopen as an aspect of the courts' jurisdiction to review final orders of removal under 8 U.S.C. 1252. Federal courts for a century have exercised jurisdiction to review such denials, and, since 1961, the courts of appeals have had jurisdiction to review the Board's denial of a motion to reopen under a deferential abuse-of-discretion standard. Nothing about this case warrants a different result.

1. The INA vests courts of appeals with Hobbs Act jurisdiction to review final orders of removal

The INA provides that, with certain exceptions not relevant here, "[j]udicial review of a final order of removal" is "governed only by chapter 158 of title 28" of the United States Code. 8 U.S.C. 1252(a)(1); see 8 U.S.C. 1252(a)(5) and (b)(9) (such review is "the sole and exclusive means for judicial review of an order of removal"). That reference to Chapter 158 of Title 28 is to the Administrative Orders Review Act of 1950, 28 U.S.C. 2341 *et seq.*, commonly known as the Hobbs Act. See *Stone* v. *INS*, 514 U.S. 386, 392-393 (1995) (discussing Section 1252's predecessor). The Hobbs Act, in turn, vests courts of appeals with jurisdiction to conduct direct review of final agency orders. 28 U.S.C. 2342.

Such review of final orders of removal is governed by the background principles in the judicial-review provisions of Section 10 of the Administrative Procedure Act (APA), which is now codified as 5 U.S.C. 701-706. In *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 50-52 (1955), this Court held that the "right of review grant-

ed by § 10 of the [APA]" governed judicial review of deportation orders under the INA. That APA review was initially conducted by district courts because at the time no "special statutory review proceeding relevant to the subject matter" governed the "form of proceeding for judicial review" of deportation orders. See 5 U.S.C. 703; *Pedreiro*, 349 U.S. at 49, 52; see also *Agosto* v. *INS*, 436 U.S. 748, 752-753 & n.3 (1978). In 1961, however, Congress enacted the predecessor to 8 U.S.C. 1252, which adopted the Hobbs Act's procedures "vest[ing] exclusive jurisdiction in the Federal courts of appeals" in order to establish a special statutory "judicial review proceeding precisely as is contemplated by the Administrative Procedure Act." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 2, 27 (1961); see *Agosto*, 436 U.S. at 752-753; 8 U.S.C. 1105a(a) (1994) (repealed 1996) (predecessor to 8 U.S.C. 1252(a)(1)). The Hobbs Act thus generally "specifies the form of proceeding for judicial review" of removal orders under the INA, while the APA "codifies the nature and attributes of judicial review." See *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987); S. Rep. No. 2618, 81st Cong., 2d Sess. 4 (1950) (explaining that "[t]he scope of review" under the Hobbs Act "is governed by [S]ection 10(e) of the [APA]," 5 U.S.C. 706).[5]

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[5] Unlike the APA's judicial-review provisions, the administrative "hearing provisions" of the APA (5 U.S.C. 554, 556, 557) do not govern removal proceedings before an IJ or the Board. *Marcello* v. *Bonds*, 349 U.S. 302, 306-307, 311 (1955); *id.* at 309 (holding that 8 U.S.C. 1229a(a)(3)'s predecessor is a "clear and categorical direction" that "exclude[s] the application of the [APA]" to administrative immigration proceedings); see *Ardestani* v. *INS*, 502 U.S. 129, 133-134 (1991).

Under the APA's judicial-review provisions, a court may set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); see *Judulang* v. *Holder*, 132 S. Ct. 476, 483 & n.7 (2011) (reviewing non-statutory policy adopted by the Board under the APA's arbitrary-and-capricious standard); *INS* v. *Doherty*, 502 U.S. 314, 330 & n.1 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (explaining that the APA's "abuse of discretion" standard applies in judicial review under the INA). The INA, however, "alter[s] or modif[ies] the[] application" of the APA's judicial-review provisions in various ways to tailor them to the immigration context. See *Stone*, 514 U.S. at 393. Among other things, Section 1252 codifies the substantial-evidence standard for judicial review of "administrative findings of fact," see 8 U.S.C. 1252(b)(4)(B); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1, 483-484 (1992), and establishes distinct standards for review of certain agency decisions not relevant here. 8 U.S.C. 1252(b)(4)(C) and (D).

2. The court of appeals' jurisdiction includes jurisdiction to review the denial of an alien's motion to reopen

The INA expressly contemplates judicial review of the Board's denial of a motion to reopen in the court of appeals' exercise of its jurisdiction under Section 1252 to review final orders of removal. 8 U.S.C. 1252(b)(6). Although Congress has sharply circumscribed review of certain discretionary decisions, courts continue to have jurisdiction to review the Board's denial of an alien's motion to reopen.

When an alien seeks judicial review of a final order of removal, the INA directs that "any review sought of a motion to reopen * * * shall be consolidated with the review of the [underlying] order." 8 U.S.C. 1252(b)(6); accord 8 U.S.C. 1105a(a)(6) (1994) (repealed 1996). Congress adopted that provision in 1990 against a long history of "[f]ederal court review of administrative decisions denying motions to reopen removal proceedings dat[ing] back to at least 1916," *Kucana* v. *Holder*, 558 U.S. 233, 242 (2010). Cf. *Stone*, 514 U.S. at 393-401 (holding that the time to seek judicial review of a final order of removal is not tolled by a subsequent motion to reopen). Congress's express provision for such review confirms the court of appeals' traditional role in reviewing motions to reopen.

In 1996, Congress added multiple provisions to the INA to limit the scope of judicial review by defining categories of agency determinations that federal courts lack "jurisdiction to review." See 8 U.S.C. 1252(a)(2); see also 8 U.S.C. 1252(a)(5). Among other things, the INA provides that courts lack "jurisdiction to review" any non-asylum decision or action "specified under [8 U.S.C. 1151-1381] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Those provisions, however, did not eliminate the court of appeals' preexisting jurisdiction to review the Board's denial of a motion to reopen. Although the Board exercises discretionary authority delegated by the Attorney General to grant or deny an alien's motion to reopen, 8 C.F.R. 1003.1(a)(1), 1003.2(a); see 8 U.S.C. 1103(g)(1) and (2), this Court has held that Section 1252(a)(2)(B)(ii)'s jurisdiction-stripping provisions do not insulate reopening decisions from judicial

review because such decisions are not specified in the INA (as distinguished from implementing regulations) to be in the discretion of the Attorney General. *Kucana*, 558 U.S. at 243-252. As a result, the Court concluded, the Board's "[a]ction on motions to reopen" that are filed by aliens "remain[s] subject to judicial review." *Id.* at 253.[6]

3. The Board's denial of a motion to reopen is reviewed under a deferential abuse-of-discretion standard

a. The Board's broad discretion with respect to reopening determines the appropriate standard of review. The INA identifies no circumstances in which reopening must be granted, see 8 U.S.C. 1229a(c)(7), and the relevant regulation (8 C.F.R. 1003.2) "is couched solely in negative terms," requiring only that "a motion to reopen be denied" if the Board determines that the motion fails to provide "material" evidence that could not have been discovered or presented earlier, *Doherty*, 502 U.S. at 322-323. The regulation thus states, without elaboration or further limitation, that "[t]he decision to grant or deny a motion to reopen is within the discretion of the Board." 8 C.F.R. 1003.2(a). An alien therefore is entitled to submit a motion to reopen for consideration, see 8 U.S.C. 1229a(c)(7), but ultimately has no right to a reopening, which remains a matter left to administrative discretion.

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[6] The Court has not decided whether "review of a reopening denial" is precluded "if the [reviewing] court would lack jurisdiction over the alien's underlying claim for relief." *Kucana*, 558 U.S. at 250 n.17. That question is not presented in this case.

Notwithstanding that discretion, this Court has "reviewed reopening decisions on numerous occasions." *Kucana*, 558 U.S. at 242. The Court has concluded that a highly "deferential, abuse-of-discretion standard of review" applies to preserve "the Board's 'broad discretion' in such matters." *Ibid.* (quoting *Doherty*, 502 U.S. at 323). The Court has recognized that the Board may deny a motion to reopen on "at least three independent grounds." *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). The abuse-of-discretion standard applies to each such ground.

First, the Board may deny reopening if it concludes that the alien failed to establish a "prima facie case" of eligibility for the substantive form of relief he seeks by failing to show a "reasonable likelihood of success on the merits" if proceedings were reopened. *In re L-O-G-*, 21 I. & N. Dec. 413, 419-420 (B.I.A. 1996); see *In re A-N- & R-M-N-*, 22 I. & N. Dec. 953, 956 (B.I.A. 1999); see also *Abudu*, 485 U.S. at 104 (noting this basis). The judgment whether an alien has shown a "reasonable likelihood" of success before the Board is a predictive judgment for the Board warranting abuse-of-discretion review. See, *e.g.*, *Antia-Perea* v. *Holder*, 768 F.3d 647, 660-661 (7th Cir. 2014) (applying abuse-of-discretion review to denial of a motion to reopen based on the Board's conclusion that the alien failed to establish a *prima facie* case of eligibility for relief); *Xiu Ling Chen* v. *Holder*, 751 F.3d 876, 879-880 (8th Cir. 2014) (same); *Jutus* v. *Holder*, 723 F.3d 105, 111-112 (1st Cir. 2013) (same); *Garcia* v. *Holder*, 621 F.3d 906, 912 (9th Cir. 2010) (same); *Alizoti* v.

Gonzales, 477 F.3d 448, 451-452 (6th Cir. 2007) (same).[7]

Second, the Board may deny reopening "even if the [alien] has made out a *prima facie* case," 8 C.F.R. 1003.2(a), if it concludes that the alien failed either to proffer "previously unavailable, material evidence" or otherwise to explain adequately his failure to seek relief earlier. *Abudu*, 485 U.S. at 104-105; see 8 C.F.R. 1003.2(c)(1) (motion "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing"). Those conclusions about the significance and adequacy of the materials submitted on reopening are subject to limited abuse-of-discretion review, see *Abudu*, 485 U.S. at 105, under which the Board's exercise of discretion survives scrutiny if it is neither "unreasoned [n]or arbitrary" and reflects "legitimate" considerations. *INS* v. *Rios-Pineda*, 471 U.S. 444, 451 (1985); *id.* at 449-451 (upholding discretionary denial of reopening on the ground that the alien satisfied a seven-year residency requirement for relief only because he delayed his removal with meritless appeals); see *Doherty*, 502 U.S. at 323-324, 326 (upholding agency's "broad discretion" in deciding whether purportedly "new" information "could have been foreseen or anticipated at the time of the earlier proceeding").

Third, "in cases in which the ultimate grant of relief is discretionary" (*e.g.*, cancellation of removal), the

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[7] To the extent that the alien's *prima facie* case turns only on a question of law, however, the Board's legal error on that question (as judged under the appropriate standard of judicial review for its legal determination) would constitute an abuse of discretion. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Board may skip the "two threshold concerns" just described and deny reopening if it concludes that the alien should not be afforded relief purely as a matter of discretion. *Abudu*, 485 U.S. at 105. That decision is also subject to abuse-of-discretion review. *Ibid.*

The Court has also held that the Board has broad "discretion in denying reopening" in other circumstances. *Rios-Pineda*, 471 U.S. at 451. In *Rios-Pineda*, the Court concluded that the Board had discretion to deny reopening based on the alien's conduct (in that case, his flagrant violation of immigration law). *Ibid.* The Court sustained the Board's ruling because its decision was not an "unreasoned or arbitrary exercise of discretion." *Ibid.*

b. The abuse-of-discretion standard also applies to judicial review of the Board's denial of an alien's request to equitably toll the filing deadline for his motion to reopen based on asserted ineffectiveness of counsel. The Board's decision to deny an equitable-tolling request is based on considerations materially similar to its consideration of reopening motions more generally. Courts therefore may review each component of the Board's tolling decision for an abuse of discretion as part of reviewing the Board's denial of the alien's motion to reopen.

The traditional concept of equitable tolling applies "only" when the party who seeks tolling demonstrates that (1) "'he has been pursuing his rights diligently'" and (2) "'some extraordinary circumstance stood in his way' and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). This Court has held with respect to deadlines for court filings that although "a garden variety claim of excusable

neglect" by counsel is not an extraordinary circumstance, "far more serious instances of attorney misconduct" can "warrant equitable tolling" when they are "extraordinary." *Id.* at 651-652 (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

The Board's equitable-tolling standard is similar. As the Board explained in this case, "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel." Pet. App. 7. That conclusion reflects the Board's holdings in numerous (albeit non-precedential) decisions that "generally accept[] the concept of equitable tolling" when an alien establishes "ineffective assistance of counsel," "so long as certain criteria are met, including a showing of due diligence and prejudice." *In re Diaz*, No. A074081757, 2009 WL 2981747, at *2 (B.I.A. Aug. 21, 2009). Those decisions demonstrate that the Board's discretionary decision whether to toll an alien's 90-day period for filing his motion to reopen turns on whether the alien (1) establishes due diligence and (2) satisfies the Board's criteria for ineffective assistance claims by (a) demonstrating prejudice from counsel's ineffective assistance and (b) substantially complying with the other requirements in *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988).[8]

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[8] See, *e.g.*, *In re Eun Jung Nam*, No. A095436835, 2012 WL 691491, at *1 (B.I.A. Feb. 10, 2012) (non-precedential) (declining to toll reopening deadline because alien failed to demonstrate "due diligence" or "substantial compliance with the *Lozada* requirements"); *In re Soto*, No. A076519236, 2011 WL 5111710, at *1 (B.I.A. Sept. 30, 2011) (non-precedential) (explaining that "[e]quitable tolling is available if the [alien] exercised due diligence in pursuing an ineffective assistance of counsel claim," "demonstrated that she was prejudiced by prior counsel's action," and

In *Lozada*, like this case, the alien filed a motion to reopen asserting counsel's ineffectiveness after his former attorney failed to file a brief and the Board summarily dismissed the alien's appeal. 19 I. & N. Dec. at 638. *Lozada* established three procedural requirements for such motions to provide the Board with an adequate "basis [to] assess[] the substantial number of claims of ineffective assistance" presented to it. *Id.* at 639.[9] Each motion must (1) include an

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substantially complied with *Lozada*'s requirements; holding the alien failed to establish prejudice); *In re Garcia Vasquez*, No. A077763439, 2010 WL 4822956, at *2 (B.I.A. Nov. 8, 2010) (non-precedential) (tolling reopening deadline, "deem[ing] [alien's motion] timely," and granting reopening because alien showed apparent eligibility for cancellation of removal, counsel's ineffectiveness, and compliance with *Lozada*'s requirements); *In re Turk*, No. A097512902, 2010 WL 4500915, at *1 (B.I.A. Oct. 19, 2010) (non-precedential) (tolling reopening deadline and granting reopening because alien "demonstrated his diligence," prejudice, and compliance with *Lozada*'s requirements); *In re Balmeo*, No. A096728889, 2009 WL 3250432, at *1 (B.I.A. Sept. 28, 2009) (non-precedential) (same); *In re Khan*, No. A78442144, 2007 WL 2074553, at *1 (B.I.A. June 15, 2007) (non-precedential) (same).

[9] The *Lozada* factors would have been partially superseded by Attorney General Mukasey's initial decision in *In re Compean*, 24 I. & N. Dec. 710, 735-741 (2009) (prescribing new requirements). On reconsideration, however, that decision was vacated by Attorney General Holder. *In re Compean*, 25 I. & N. Dec. 1, 2-3 (2009). The Attorney General's new opinion directed the Board to "apply the pre-*Compean* standards" from *Lozada* to all motions to reopen based on allegedly deficient counsel performance and directed the initiation of a Department of Justice rulemaking to evaluate whether the *Lozada* administrative framework should be revised. *Ibid.* The Department's rulemaking agenda currently lists a projected publication date of November 2015 for the notice of proposed rulemaking. See Office of Regulatory Affairs, Office of Mgmt. & Budget, *Motions To Reopen Removal, Deportation, or*

affidavit from the alien documenting the "relevant facts," including a "detail[ed]" description of his agreement with counsel about "the actions to be taken on appeal and what counsel did or did not represent to the [alien] in this regard"; (2) show that the alien informed his (former) counsel of the allegations levied against him, afforded counsel an "opportunity to respond," and submitted any response with the motion; and (3) show that "a complaint has been filed with appropriate disciplinary authorities" with respect to any violation of counsel's "ethical or legal responsibilities" or explain why one was not filed. *Ibid.*; see *In re Assaad*, 23 I. & N. Dec. 553, 556 (B.I.A. 2003) (reaffirming *Lozada*'s requirements). The alien must also demonstrate that he was "prejudice[d]" by counsel's deficient actions or inactions. *Lozada*, 19 I. & N. Dec. at 638, 640; see *Assaad*, 23 I. & N. Dec. at 556. Among other things, the "prejudice" requirement, like the *prima-facie*-eligibility requirement for every motion to reopen, requires a showing that the alien "is eligible for the [substantive] relief sought" in the proceedings. Pet. App. 7.[10]

Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel (2014), http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1125-AA68.

[10] *Lozada* based its analysis of ineffective assistance on the view that the Due Process Clause confers a right to effective counsel in immigration proceedings. 19 I. & N. Dec. at 638; see *Assaad*, 23 I. & N. Dec. at 557-559. Attorney General Mukasey's initial opinion in *Compean* rejected that constitutional conclusion, 24 I. & N. Dec. at 714, 716-727, but determined that the Department of Justice would recognize such claims for reopening as a matter of administrative discretion in the exercise of its "broad authority to reopen removal proceedings," *id.* at 727-730. When Attorney General Holder vacated that decision on reconsideration, he noted that

Each of those components of the Board's tolling analysis, like the Board's reopening determinations of which they are a part, is subject to abuse-of-discretion review. The courts of appeals thus routinely review the Board's equitable-tolling decisions for an abuse of discretion. See, *e.g.*, *Kuusk* v. *Holder*, 732 F.3d 302, 305, 307 (4th Cir. 2013); *Bead* v. *Holder*, 703 F.3d 591, 594 (1st Cir. 2013); *El-Gazawy* v. *Holder*, 690 F.3d 852, 859-860 (7th Cir. 2012); *Avagyan* v. *Holder*, 646 F.3d 672, 678 (9th Cir. 2011); *Alzaarir* v. *Attorney Gen.*, 639 F.3d 86, 91 (3d Cir. 2011) (per curiam); *Mezo* v. *Holder*, 615 F.3d 616, 622 (6th Cir. 2010).

4. The court of appeals had jurisdiction to review the Board's denial of petitioner's request for equitable tolling under the same standards that apply in judicial review of the Board's denials of motions to reopen more generally

The court of appeals had jurisdiction to review the Board's decision denying petitioner's motion to reopen in this case. The Board determined that "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel," but it rejected petitioner's request to toll his filing deadline because petitioner

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Attorney General Mukasey's constitutional analysis was "not necessary" but stated that the Department's "litigating positions" would "remain unaffected" by his order on reconsideration. *Compean*, 25 I. & N. Dec. at 2-3. The Department's longstanding litigating position is that aliens cannot establish a due-process claim based on counsel's ineffectiveness in removal proceedings because they have no constitutionally protected right to counsel in such proceedings, and that any remedy for deficient conduct by counsel must therefore be derived from the Board's administrative framework for reopening claims. See, *e.g.*, Br. in Opp. at 16-17, *Merchant* v. *Holder*, 134 S. Ct. 1276 (2014) (No. 13-400); Gov't Br. at 10-12, *Afanwi* v. *Holder*, 558 U.S. 801 (2009) (No. 08-906).

failed to establish that he was prejudiced by his counsel's ineffectiveness. Pet. App. 7. More specifically, the Board concluded that reopening was unwarranted because petitioner's motion failed to show that petitioner was eligible for cancellation-of-removal relief if removal proceedings were reopened and, for that reason, petitioner failed to show prejudice from his counsel's failure to file an appellate brief with the Board. *Id.* at 7-9.

That determination by the Board that petitioner's reopening motion failed to establish a *prima facie* case of "eligib[ility] for the [underlying] relief" that he would be seeking in reopened proceedings, Pet. App. 7, is parallel to the Board's evaluation of an alien's showing of a *prima facie* case for such underlying relief in any motion to reopen. The standard of review of that determination—abuse of discretion—is therefore the same as in any other case in which the Board denies a motion to reopen because it finds the alien's *prima facie* case for relief insufficiently established by the evidentiary material or other submissions accompanying the motion.

Just as courts of appeals have jurisdiction to review such denials when the alien's motion to reopen is filed within the 90-day period, they have jurisdiction to review the same type of denials when the alien's motion is filed after 90 days have passed. In other words, whether or not the Board erred in its tolling decision in this case, the court of appeals had jurisdiction to decide that question in the course of resolving the merits of petitioner's petition for review.

B. The Court Of Appeals Erred In "Construing" Petitioner's Request To The Board For Equitable Tolling Of The Deadline For His Motion To Reopen As Only An Invitation That The Board Reopen Proceedings On Its Own Motion

1. The Board's decision whether to equitably toll an alien's reopening-motion deadline is different from a determination whether to reopen proceedings sua sponte

The court of appeals' conclusion that it lacked jurisdiction to review the Board's order denying petitioner's motion to reopen rested on the court's mistaken view that petitioner's request that the Board equitably toll the filing deadline for his motion to reopen should be "construed" as merely an invitation to the Board to "reopen the removal proceedings *sua sponte*," *i.e.*, on the Board's own motion. See Pet. App. 2. That artificial recharacterization of the issue on which the Board based its no-tolling decision was erroneous and suffers from multiple defects.

First, and most fundamentally, the recharacterization does not reflect how the Board decided this case. The Board specifically concluded that "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel," Pet. App. 7, and proceeded to evaluate petitioner's tolling request on its own terms. A court engaged in judicial review of agency action must "confin[e] [its] review to a judgment upon the validity of the grounds upon which the [*agency*] *itself* based its action." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (emphasis added). The court of appeals' transformation of the agency's decision into a hypothetical one that the court could not review fun-

damentally misconceives the proper nature of judicial review of agency action.

Second, the Board treats an equitable-tolling request in an alien's motion to reopen as distinct from a suggestion that the Board exercise its separate power to reopen proceedings on its own motion. The Board not infrequently will first address the merits of an alien's request for equitable tolling and then separately decide whether the case is a candidate for *sua sponte* reopening.[11] Indeed, the last paragraph of the

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[11] See, *e.g.*, *In re Guzman-Vasquez*, No. A044002033, 2014 WL 1118477, at *1 (B.I.A. Feb. 18, 2014) (non-precedential) (ruling that "[e]quitable tolling is unavailable" because alien failed to establish tolling was warranted and "also conclud[ing] that sua sponte reopening would be inappropriate"); *In re Medina-Hernandez*, No. A097743520, 2014 WL 1120190, at *3 (B.I.A. Feb. 7, 2014) (non-precedential) (affirming IJ's denial of untimely motion to reopen because, "even if the [alien] established a meritorious claim for equitable tolling, she has not otherwise satisfied the motion to reopen requirements"; separately affirming IJ's conclusion that *sua sponte* reopening was unwarranted); *In re Avila-Santoyo*, No. A088920938, 2013 WL 6921647, at *4-*5 (B.I.A. Dec. 12, 2013) (non-precedential) (ruling that the Board "need not address the underlying merits of [the alien's] motion to reopen" because the motion was untimely and "equitable tolling is not warranted" because alien was not diligent; separately concluding that "sua sponte reopening is not warranted"), pet. for review denied, 579 Fed. Appx. 860 (11th Cir. 2014); *Eun Jung Nam*, 2012 WL 691491, at *2 (concluding that tolling was unwarranted before stating in the final paragraph that the alien also failed to identify a basis "to grant her request to reopen these proceedings sua sponte"); *Soto*, 2011 WL 5111710, at *1 (concluding that tolling was unwarranted before stating in the last paragraph that, "[f]inally, we will not exercise our sua sponte authority"); *Garcia Vasquez*, 2010 WL 4822956, at *1 (declining to revisit prior rejection of alien's suggestion "to reopen *sua sponte*" but finding equitable tolling warranted such that the alien's reopening "motion is deemed timely").

Board's decision in this very case reflects the Board's distinct conclusion, after having determined that tolling was unwarranted (Pet. App. 7-9), that this case did not present an occasion for it to exercise its authority to "reopen on [its] own motion." *Id.* at 9 (quoting *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997)). That distinct treatment of equitable tolling and *sua sponte* reopening underscores the fundamental difference between those concepts in the Board's decisions.

Third, the Board's authority to equitably toll the 90-day filing deadline for an *alien's motion* to reopen is logically and doctrinally distinct from the Board's independent authority to reopen removal proceedings "on its *own motion*," 8 C.F.R. 1003.2(a) (emphasis added). The concept of tolling necessarily concerns a filing deadline that is applicable to the party seeking to file, and in this context the only such deadline is the 90-day period within which *the alien* may file *his* motion to reopen. 8 U.S.C. 1229a(c)(7)(C)(i); 8 C.F.R. 1003.2(c)(2). "Tolling" is a non-sequitur when the Board considers whether to exercise its *sua sponte* authority, which permits the Board to reopen a case "on its own motion" "at any time." 8 C.F.R. 1003.2(a). It thus makes no sense to "construe" petitioner's tolling request as an invitation to the Board to reopen proceedings on its own motion on the basis of equitable tolling.

Finally, whether or not the Board erred in its equitable-tolling ruling has no bearing on the court of appeals' jurisdiction to review that ruling. Even if a reviewing court were to conclude that the Board lacks authority to toll an alien's 90-day deadline to file a motion to reopen (contrary to the unanimous view of every court of appeals that has resolved the issue, see

Kuusk, 732 F.3d at 305), the court would still possess jurisdiction to review a ruling by the Board denying a request for equitable tolling as part of a decision denying the alien's motion to reopen. In that situation, the correct disposition of the alien's petition for review would be to deny the petition *on its merits* because the Board did not err in denying tolling. On the other hand, if a reviewing court concludes that the Board generally does possess authority to equitably toll the 90-day filing deadline for an alien to file a motion to reopen, the proper course is to review the Board's *exercise* of that authority for an abuse of discretion. Either way, the court of appeals has jurisdiction to review a Board decision that denies equitable tolling. The court of appeals in this case erred in its contrary conclusion.

2. The Court should remand to allow the court of appeals to resolve this case on its merits

a. Because the narrow question presented in this Court is whether the court of appeals had "jurisdiction to review Petitioner's request that the Board equitably toll the 90-day deadline on his motion to reopen," Pet. i, this case presents no occasion for the Court to resolve the underlying merits question whether the Board may apply equitable tolling in this context. "[T]he fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before [the Court]," because this Court's "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for [the Court's] review," *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (citation and brackets omitted), and the question here is specifically limited to the question of jurisdiction.

If this Court reverses the court of appeals' jurisdictional ruling and remands this case for further proceedings, the court of appeals will be able to address the merits of this case. Because it is still an open question in the Fifth Circuit whether equitable tolling can extend the statutory 90-day deadline for an alien's filing of a motion to reopen, the court of appeals can resolve that question on remand; if it concludes the Board does have that authority, it can proceed to review the Board's denial of reopening for an abuse of discretion. Alternatively, the court of appeals could assume *arguendo* that tolling exists and review the Board's two bases for determining that petitioner failed to show prejudice from the asserted ineffectiveness of his counsel. See, *e.g.*, *Xue Su Wang* v. *Holder*, 750 F.3d 87, 90 (1st Cir. 2014) (reviewing Board's tolling decision on that assumption). If petitioner remains aggrieved after such proceedings on the merits, he may seek further review.

Allowing such matters to be resolved in the first instance on remand is the appropriate course. Although "[e]very circuit to have addressed the issue" has concluded that "the principles of equitable tolling apply" to an alien's deadline for filing "a motion to reopen removal proceedings," *Kuusk*, 732 F.3d at 305 (4th Cir.), the court of appeals in this case is one of the two courts of appeals with jurisdiction to review final orders of removal that has yet to resolve the question in a precedential decision.[12] The Fifth Circuit has

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[12] See, *e.g.*, *Avila-Santoyo* v. *United States Att'y Gen.*, 713 F.3d 1357, 1359 (11th Cir. 2013) (en banc) (per curiam); *Rashid* v. *Mukasey*, 533 F.3d 127, 130-131 (2d Cir. 2008); *Barry* v. *Mukasey*, 524 F.3d 721, 724-725 (6th Cir. 2008); *Yuan Gao* v. *Mukasey*, 519 F.3d 376, 377-378 (7th Cir. 2008); *Valeriano* v. *Gonzales*, 474 F.3d

addressed the issue in unpublished, non-precedential decisions reaching conflicting results, but nothing in those non-binding decisions would preclude the court of appeals from resolving that question afresh.

In *Torabi* v. *Gonzales*, 165 Fed. Appx. 326, 331 (2006) (per curiam) (unpublished), the Fifth Circuit followed the unanimous judgment of the other courts of appeals to have addressed the issue and concluded that the "doctrine of equitable tolling" applies and can toll the filing deadline for an alien's motion to reopen. Later, in *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (5th Cir. 2008) (per curiam) (unpublished), the court stated that "equitable tolling is not a basis for filing an untimely * * * motion [to reopen] under the statute or regulations," but the court provided no analysis and cited no authority to support that conclusion. The *Lin* court then determined that, because it had held tolling to be unavailable, Lin's argument that his filing deadline "should have been equitably tolled based on ineffective assistance of counsel * * * is in essence an argument that the [Board] should have exercised its discretion to reopen proceedings sua sponte based

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669, 673-674 (9th Cir. 2007); *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Borges* v. *Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005); *Riley* v. *INS*, 310 F.3d 1253, 1258 (10th Cir. 2002). The First Circuit has "not yet decided whether equitable tolling can suspend the time limits applicable to motions to reopen." *Xue Su Wang*, 750 F.3d at 90.

The D.C. and Federal Circuits do not conduct judicial review under Section 1252. Such review occurs only in those regional courts of appeals in which an immigration judge holds removal proceedings, 8 U.S.C. 1252(b)(2), and no removal proceedings are held in the District of Columbia, see U.S. Dep't of Justice, *EOIR Immigration Court Listing* (Jan. 2015), http://www.justice.gov/eoir/sibpages/ICadr.htm.

upon the doctrine of equitable tolling." *Ibid.* And because the Fifth Circuit had previously held (like its sister circuits) that it lacks jurisdiction to review the Board's wholly discretionary decision not to reopen proceedings *sua sponte*, the court dismissed for want of jurisdiction. *Ibid.*[13]

The Fifth Circuit later issued a precedential decision that adopted the second portion of *Lin* that recharacterized tolling requests as requests for *sua sponte* reopening. But in doing so, the court of appeals neither discussed nor resolved whether the Board has authority to equitably toll an alien's reopening-motion deadline. The court simply stated that "a request for equitable tolling of a time- or number-barred motion to reopen on the basis of ineffective assistance of counsel is 'in essence an argument that the [Board] should have exercised its discretion to reopen the proceeding sua sponte based upon the

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[13] The Board's decision not to exercise its authority to reopen proceedings *sua sponte* is not subject to judicial review because the *sua sponte* reopening regulation confers no private rights and no judicially manageable standards exist for reviewing such a decision, which is committed to agency discretion by law, see 5 U.S.C. 702(a)(2). All 11 courts of appeals exercising jurisdiction under Section 1252 agree that "the Board's decision not to reopen removal proceedings *sua sponte*" is "unreviewable." *Kucana*, 558 U.S. at 251 n.18 (noting decisions but expressing no opinion on the question); cf. *Brotherhood of Locomotive Eng'rs*, 482 U.S. at 282 (noting "the impossibility of devising an adequate standard of review" of an agency decision not to reconsider a decision for material error and holding that such a decision is unreviewable under 5 U.S.C. 701(a)(2)). One court of appeals has held that a Board decision that reopens proceedings *sua sponte* adversely to the alien, unlike a Board decision not to reopen, is subject to limited judicial review. *Chehazeh* v. *Attorney Gen.*, 666 F.3d 118, 127-130 (3d Cir. 2012).

doctrine of equitable tolling.'" *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) (quoting *Lin*, 286 Fed. Appx. at 150). And based on that limited holding, the court concluded that it "lack[ed] jurisdiction to review the [Board's] denial[] of [the alien's] motions to reopen" and declined to "reach [his] equitable tolling * * * arguments on their merits." *Ibid.*

The court of appeals in this case followed *Ramos-Bonilla*, "construed" petitioner's tolling request to be an invitation to the Board to engage in *sua sponte* reopening, and dismissed for want of jurisdiction. Pet. App. 2-3. If this Court were to reverse that jurisdictional holding and remand for the court of appeals to review the Board's denial of equitable tolling on its own terms, the court of appeals would be able to consider in the first instance whether the Board has authority to equitably toll an alien's deadline for filing a motion to reopen. That merits issue, as noted above, is not before this Court because it lies outside the question presented. Indeed, review of that question would be unwarranted at this time even if it were otherwise presented because the court of appeals has never issued a reasoned decision, let alone a precedential one, holding that the Board lacks authority to toll the alien's filing deadline. Cf. *Holland*, 560 U.S. at 654 ("[T]his is a court of final review and not first view.") (citation omitted).[14]

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[14] This Court recently denied a petition for a writ of certiorari arising from the Fifth Circuit that asked the Court to decide whether an alien's 90-day deadline to file a motion to reopen is subject to equitable tolling. See *Whiteley* v. *Holder*, 135 S. Ct. 675 (2014); see also Gov't Br. in Opp. at 19-20, *Whiteley*, *supra* (No. 14-

b. We note, however, that the government agrees with petitioner (Pet. 17) that the time within which an alien may file a motion to reopen may be equitably tolled by the Board. The availability of tolling is warranted because the Board has permissibly incorporated such tolling into its procedures implementing the INA's administrative removal process.

To the extent that petitioner has relied on decisions applying equitable tolling in judicial proceedings (see Pet. 17), those decisions do not control the availability of tolling in administrative proceedings. This Court's decision in *Irwin* articulated a "rebuttable presumption of equitable tolling" based on the Court's view that the presumption is normally a "realistic assessment of legislative intent." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827 (2013) (quoting *Irwin*, 498 U.S. at 95-96). This Court has since applied that presumption in certain contexts involving "time limits for filing suit in federal court." *Ibid.* But the Court has "never applied the *Irwin* presumption to an *agency*'s internal * * * deadline" for seeking review of an earlier agency decision. *Ibid.* (emphasis added). That distinction between court- and agency-filing deadlines reflects two related features of administrative law.

First, administrative tribunals and courts are different in "origin and function" and their differences "'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976) (quoting *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 142-143 (1940));

5188) (explaining that the question is still open in the Fifth Circuit).

see, *e.g.*, *INS* v. *Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam) (holding that when a reviewing court concludes that the Board erred, it must "remand to the agency for additional" proceedings with only "rare" exception; the reviewing court's resolution of issues not yet resolved by the Board "seriously disregard[s] the agency's legally mandated role") (citation omitted); *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253 (1944) (refusing to "incorporat[e] the judicial concept of estoppel into [the agency's] procedure"). Unlike a court's review of "the action of a lower court," which forms "one phase of a single unified process," judicial review of an agency decision implicates "the distribution of authority made by Congress" in conferring substantive power on the agency and granting circumscribed review to the courts. *Pottsville Broad. Co.*, 309 U.S. at 141; see *id.* at 144 (applying principles developed during court review of lower court rulings to agencies would be to interpret "the laws of Congress through the distorting lenses of inapplicable legal doctrine").

Second, it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978). It has long been settled that "the formulation of [such] procedures [i]s basically to be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments." *Id.* at 524; see, *e.g.*, *Pottsville Broad. Co.*, 309 U.S. at 143. Implicit in Congress's grant of administrative decision-making power is the "determination that administrative agencies * * * will be in a better position than federal courts or Congress itself to design procedural

rules adapted to the peculiarities of the * * * tasks of the agency involved." *Vermont Yankee*, 435 U.S. at 525 (quoting *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965)). For that reason, courts presume that "Congress intend[s] that the discretion of the *agencies* and not that of the courts be exercised in determining" whether to impose additional procedural protections beyond those granted by statute. *Id.* at 546.

As a result, the governing presumption in this administrative context is that Congress intends to vest an administrative agency with both authority to construe its governing statute and discretion to develop its own tolling procedures for the time to seek internal agency review (or reopening) of an earlier agency decision, because the agency is in a "better position than federal courts or Congress itself to design [its own] procedural rules." *Vermont Yankee*, 435 U.S. at 525 (citation omitted).

The INA does not preclude the Attorney General (or the Board as his delegee) from adopting tolling principles in this context. Significantly, when Congress enacted the 90-day deadline in Section 1229a(c)(7)(C)(i) in 1996, it did not disturb the long tradition of Board authority to reopen removal proceedings at any time. For at least half a century, the Board has been authorized to reopen at any time any removal proceeding in which it rendered a decision. See 8 C.F.R. 1003.2(a) (authorizing Board to reopen "any case" in which it has rendered a decision on its own motion "at any time"); 8 C.F.R. 3.2(a) (1997) (adopted Apr. 1996) (same); 8 C.F.R. 3.2 (1996) (adopted Jan. 1962) (authorizing Board and IJ to reopen "any case" in which a decision has been made on its own motion with no deadline). This Court had also

confirmed before 1996 that the Board has "broad discretion" in deciding whether to reopen proceedings. See, *e.g.*, *Doherty*, 502 U.S. at 317; *Rios-Pineda*, 471 U.S. at 449. Given that the Board retained authority and broad discretion to reopen proceedings on its own motion at any time, it would be anomalous to conclude that Congress intended to prevent the Board from exercising discretion to apply equitable tolling principles to, and to consider the merits of, an otherwise untimely motion to reopen filed by an alien.

The foregoing considerations, however, are not before the Court at this time.[15] The court of appeals merely concluded that it lacked jurisdiction to entertain petitioner's challenge to the Board's denial of his motion to reopen. That jurisdictional holding was erroneous.

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[15] The Court is currently considering the availability of equitable tolling of the two-year and six-month time limits for filing an administrative claim and subsequent suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* See *United States* v. *Wong*, No. 13-1074 (argued Dec. 10, 2014); *United States* v. *June*, No. 13-1075 (argued Dec. 10, 2014).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 701 (APA § 10 introductory clause) provides in pertinent part:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

* * * * *

2. 5 U.S.C. 706 (APA § 10(e)) provides in pertinent part:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * * *

3. 8 U.S.C. 1229a (INA § 240) provides in pertinent part:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

* * * * *

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

* * * * *

(b) Conduct of proceeding

* * * * *

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in

absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

* * * * *

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

* * * * *

(c) Decision and burden of proof

* * * * *

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application

form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

* * * * *

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

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[1] So in original.

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this

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[1] So in original.

title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

* * * * *

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

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[2] So in original. A closing parenthesis probably should appear.

4. 8 U.S.C. 1229b (INA § 240A) provides in pertinent part:

Cancellation of removal; adjustment of status

* * * * *

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * * * *

5. 8 U.S.C. 1252 (INA § 242) provides in pertinent part:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

* * * * *

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to with subsection (b)(4)(B) of this section, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

* * * * *

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

* * * * *

6. 8 C.F.R. 1003.2 provides in pertinent part:

Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

* * * * *

(c) *Motion to reopen.* (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears

that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph

(c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 1003.23(b)(4)(iii)(A)(1) or § 1003.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

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7. 8 C.F.R. 1003.23 provides in pertinent part:

Reopening or reconsideration before the Immigration Court.

* * * * *

(b) *Before the Immigration Court*—(1) *In general.* An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act. Nor shall

such limitations apply to motions by the Service in exclusion or deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(e) of this chapter.

* * * * *

(iv) *Replies to motions; decision.* The Immigration Judge may set and extend time limits for replies to motions to reopen or reconsider. A motion shall be deemed unopposed unless timely response is made. The decision to grant or deny a motion to reopen or a motion to reconsider is within the discretion of the Immigration Judge.

* * * * *

(3) *Motion to reopen.* A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief

is sought on the basis of circumstances that have arisen subsequent to the hearing. Pursuant to section 240A(d)(1) of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) (cancellation of removal for certain permanent residents) or 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents) may be granted only if the alien demonstrates that he or she was statutorily eligible for such relief prior to the service of a notice to appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible or removable under sections 237(a)(2) of the Act or (a)(4), whichever is earliest. The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.

(4) *Exceptions to filing deadlines*—(i) *Asylum and withholding of removal.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. The filing of a motion to reopen under this section shall not automatically stay the removal of the alien. However, the alien may request a stay and, if granted by the Immigration Judge, the alien shall not be removed pending disposition of the motion by

the Immigration Judge. If the original asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider, or for a stay of removal.

(ii) *Order entered in absentia or removal proceedings.* An order of removal entered in absentia or in removal proceedings pursuant to section 240(b)(5) of the Act may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal, if the alien demonstrates that the failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act. An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice in accordance with sections 239(a)(1) or (2) of the Act, or the alien demonstrates that he or she was in Federal or state custody and the failure to appear was through no fault of the alien. However, in accordance with section 240(b)(5)(B) of the Act, no written notice of a change in time or place of proceeding shall be required if the alien has failed to provide the address required under section 239(a)(1)(F) of the Act. The filing of a motion under this paragraph shall stay the removal of the alien pending disposition of the motion by the Immigration Judge. An alien may file only one motion pursuant to this paragraph.

(iii) *Order entered in absentia in deportation or exclusion proceedings.* (A) An order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed:

(*1*) Within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances beyond the control of the alien (e.g., serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances); or

(*2*) At any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien.

(B) A motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia must be supported by evidence that the alien had reasonable cause for his failure to appear.

(C) The filing of a motion to reopen under paragraph (b)(4)(iii)(A) of this section shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

(D) The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen filed pursuant to the provisions of paragraph (b)(4)(iii)(A) of this section.

(iv) *Jointly filed motions.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen agreed upon by all parties and jointly filed.